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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1134

FRANCIS J. DUGAN
Petitioner,

v.

FRED KORTH, ET AL.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 14, 1964 (R. 330).

OPINIONS BELOW

There were no opinions by the court below.

JURISDICTION

Petitioner seeks to review judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 14, 1964 (R. 330). Motion for rehearing was denied on December 21, 1965 (R. 337). The jurisdiction of this Court is invoked under 28 U.S.C., ¶ 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner can be reduced in rank without the Secretary of the Navy following the procedures established by statute for that purpose?

2. Whether petitioner's right of appeal authorized by the Veterans' Preference Act can be nullified by the Civil Service Commissioners adopting a policy to not act upon said appeal unless the Navy Department first issued a standard personnel action form; and the Navy Department adopting a policy to not issue such form unless the Civil Service Commission so ordered. Here the Civil Service Commission did not order the issuance of such standard personnel action form by the Navy Department, with the result that petitioner's right of appeal was thereby abolished.

3. Whether the conduct of respondents in arbitrarily refusing to consider petitioner's appeal deprived petitioner of the rights guaranteed to him by statute?

4. Did respondents act arbitrarily and contrary to law in ruling that petitioner was not reduced in rank.

STATUTE INVOLVED

Section 14 of the Veterans' Preference Act of 1944 (Title 5, U.S.C. ¶ 863 provides:

> "No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall

be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right of appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date or receipt of notice of such adverse decision * * *."

STATEMENT OF THE CASE

Petitioner is a permanent civil service employee of the Boston Naval Shipyard entitled to veterans' preference (J.A. 178) authorized by Section 14 of the Veterans Preference Act of 1944 (Title 5, U.S.C. ¶ 863). He served as Master Shipfitter prior to shop grouping reorganization in the Boston Naval Shipyard, and was in charge of all personnel and work performed in the Structural Group (J.A. 46-48) and Shop 26 (J.A. 47-48). At the same time one F. J. Simon who is not entitled to veterans' preference was in charge of Shop 17 which was administratively grouped with Shops 11 and 26, and Mr. Simon was selected as Group Master. On February 1, 1961 (J.A. 320-321) petitioner was advised by the Boston Shipyard Commander as follows:

"By my letter to you of 30 November 1960 you were advised of the grouping of Shops 11/26 and 17 and that you were to continue to direct the affairs of your shop as heretofore, pending my approval of an organization plan for the shop group.

The organizational plan for your shop group has been submitted and generally approved. Accordingly, as of this date Mr. Simon has been given full authority to implement the plan as approved, and has been assigned full responsibility for over-all policy, administration and operation of all shops included in his group.

As head of Shops 11/26, you will report directly to and will be accountable to Mr. Simon for all matters affecting the organization facilities, and administration of the Shipfitting and Welding Shops, and for such other additional duties as he may assign in connection with the over-all shop grouping plan. In

my considered opinion shop grouping offers many opportunities for improving our operations and enhancing the effectiveness of the support which we furnish the Fleet. I am sure that I can count on you to continue to give the plan and Mr. Simon your wholehearted and unfailing support and cooperation."

Petitioner appealed (J.A. 177-178) the above adverse personnel action on February 6, 1961 to the Director, U.S. Civil Service Regional Office, upon the ground that the above-quoted letter constituted a reduction in rank as it had the effect of lowering his level of supervision. Whereas he formerly reported directly to the Production Officer, he now reports to F. J. Simon in his capacity as Group Master, who in turn reports to the Production Officer.

Respondents refused to consider the above-quoted letter as a "personnel action" on which petitioner based his appeal to the Civil Service Commission; and respondents arbitrarily refused to take jurisdiction of such appeal upon the ground that it was not "within the purview of Section 14 of the Veterans Preference Act". Thus petitioner was deprived of his right of appeal by this adverse action of respondents.

The motion of petitioner for summary judgment was denied by the District Court and that judgment was affirmed by the Court below (J.A. 330). Petitioner's petition for rehearing was denied December 21, 1965 (J.A. 337).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia has decided a question of general importance and substance relating to the construction or application of a statute of the United States which should be settled by this Court.

I

Reduction in Rank Contrary to Law

Petitioner was reduced in rank by the Secretary of the Navy, although there was no compliance with the following requirements of Section 14 of the Veterans' Preference Act:

(a) No reasons were given in writing for this action by Respondent No. 1.

(b) Petitioner was not given thirty days' advance notice in writing by Respondent No. 1 for this proposed action.

(c) Petitioner did not receive from Respondent No. 1, the Secretary of the Navy, a statement of any and all reasons, specifically and in detail, for reducing him in rank.

The courts have intervened to enforce compliance with specific procedural steps required by law and regulations *U.S. v. Wickersham*, 201 U.S. 390; *Mulligan v. Andrews*, 211 F.2d 28 (C.A.D.C.); *Manning v. Stevens*, 208 F.2d 827 (C.A.D.C.); *Money v. Anderson*, 208 F.2d 34 (C.A.D.C.); *Borak v. Biddle*, 141 F.2d 278 (C.A.D.C.), certiorari denied, 323 U.S. 738.

Respondents arbitrarily refused to consider petitioner's appeal. Petitioner's right of appeal as authorized by Section 14 of the Veterans' Preference Act was nullified by the Respondents Civil Service Commissioners adopting the policy here that the Civil Service Commission would not act unless and until the Navy Department issued a standard personnel action form and the Navy Department adopting a policy here to not issue such form unless and until the Civil Service Commission so ordered. As a result petitioner's right of appeal as authorized by the Veterans' Preference Act was nullified by the above-mentioned combined arbitrary and capricious action of all respondents, and constituted procedural error.

When the administrative decision is arbitrary or capricious or so gravely erroneous as to imply bad faith it will be set aside. *Burchell v. Marsch*, 17 How. 344, 349, 15 L. Ed. 96; *Kihlberg v. United States*, 970 U.S. 398, 24 L. Ed. 1106; *United States v. Gleason*, 175 U.S. 588, 602, 20 S.Ct. 22, 8, 44 L.Ed. 284; *Ripley v. United States*, 223 U.S. 695, 701, 32 S.Ct. 352, 56 L. Ed. 614.

Respondents aver that there was no reduction in rank. Their decision however, was not rendered after a hearing where evidence was introduced bearing upon the matter. Petitioner is entitled to have the question of whether there was a reduction in rank determined on appeal to the Civil Service Commission as authorized by Title 5 U.S.C. ¶ 863.

In the concurring opinion of Justice Frankfurter in the case of *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, at page 165, it was said:

> 'The construction placed by the court upon legislation conferring administrative powers shows consistent respect for the requirement of fair procedure before men are denied or deprived of their rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. See, e.g., *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *American Power Co. v. S.E.C.*, 329 U.S. 90, 107-108; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49.

At page 168 the Court said:

> 'This court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts.

> But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. See *Switchmen's Union v. National Mediation Board*, 320 U.S. 297; *Tubun v. United States*, 270 U.S. 568, 576, 577; *Pa. R. Co. v. Labor Board*, 261 U.S. 72.

Prior to February 1, 1961 as Master Shipfitter petitioner performed all the duties to the same extent that they are now performed by the Group Master (J.A. 164). Petitioner has been deprived of final authority over Shops 11/26 which he had prior to February 1, 1961, and such authority has been transferred to the Group Master (J.A. 161). There are 47 duties which petitioner no longer performs as set forth in J.A. 161-164. It is clear therefore that petitioner's responsibility since February 1, 1961 has been lessened, his authority has been diminished, his grade determinant functions have been transferred to the Group Master and he is now subordinate to the Group Master in the performance of his actual duties which have been curtailed and reduced (J.A. 165).

In *Dismuke v. United States*, 297 U.S. 167, 172, the Court said that "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer ... If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, ... or failing to follow a procedure which sets elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized. . . ."

II.

Reduction in Rank by Transfer of Duties, Functions and Responsibilities

The duties which were transferred from petitioner's supervision were as follows: (J.A. 161-164):

(d) The formulating and establishing overall shop policy for Shops 11/26 composed of over 1300 employees.

(e) The Administration of Shops 11/26.

(f) The operations of Shops 11/26.

(g) The organization of Shops 11/26.

(h) The facilities of Shops 11/26, $10,421,000 Buildings and Equipment, 260,000 square feet of usable area.

(i) Preparation and submission of Shop Budget; $1,500,000 yearly.

(j) Such other duties as the Group Master may assign (a catch-all).

(k) Supervision of Shops 11/26 employees (1300).

(l) Supervision of 13 different trades in 15 different ratings, performing diversified trade operations.

(m) Supervision of Shop 11/26 employees over a wide geographical work area, several buildings, many ships, on a three-shift-a-day basis.

(n) Supervision of experimental or non-standard work of Shops 11/26.

(o) Coordinating the efforts of Shops 11/26 in relation to inter and intra-shop relationships, and all other areas.

(p) Supervision of Shop Planning, Clerical and Personnel Sections of Shops 11/26.

(q) Policy meetings with the Production Officer and higher authority.

(r) Ordered to attend lower grade meetings with the Repair Superintendent, formerly my Foreman's assignment.

(s) Scheduling work operations of Shop 11/26.

(t) Formulating Shops 11/26 Safety policy.

(u) Determination of "fitness of employees" physical and trade qualifications for Shops 11/26.

(v) Determination of manpower needs for Shops 11/26, by trades and numbers.

(w) Determination of Supervisory needs of Shops 11/26 by trades and numbers.

(x) Selection of supervision for Shops 11/26 by trade and number.

(y) Assignment of supervision for Shops 11/26 by trade and area.

(z) Determination of training needs of Shops 11/26, types and amounts, by trade.

(aa) Performance of trade operations of all Shop 11/26 Supervision and artisans.

(bb) Settlement of trade jurisdictional disputes with labor union officials, or other Shop Masters, relating to Shops 11/26 employees.

(cc) Responsibility to determine the types and procedures of administrative controls to control and coordinate the production operations of Shops 11.26.

(dd) The determination of need, selection and assignment of Shop Planners in Shops 11/26.

(ee) The determination and establishment of Disciplinary Action Policy in Shops 11/26.

(ff) The determination of policy in personnel matters; types of leave, safety, training, fund drives, blood drives, bond drives, Beneficial suggestions, Incentive Awards, Conservation, etc., for Shops 11/26.

(gg) Determination of need, assignment and selection of administrative personnel for Shops 11/26.

(hh) Determination of need and types of administrative procedures to control Shops 11/26 operations.

(ii) Responsibility for Housekeeping and cleanliness of the building and working area of Shops 11/26.

(jj) Responsibility for shop indoctrination tours of military personnel newly assigned to the activity in relation to Shops 11/26.

(kk) Responsibility for award presentations to Shops 11/26 personnel (Safety, longevity, Beneficial Suggestion, Superior Performances, etc.) for both final review and presentation.

(ll) Responsibility to determine need for submission of and final review of overtime requests for Shops 11/26.

(mm) Assignment of areas, as to use, in building under control of Shops 11/26.

(nn) Resolution of material shortages affecting Shop 11/26 operations.

(oo) Responsibility for procurement, security, and maintenance of Shops 11/26 buildings and equipment.

(pp) Responsibility for timely and economical completion of Shops 11/26 work operations.

(qq) Responsibility for security clearance of personnel of Shops 11/26.

(rr) Responsibility as the highest and final technical authority for Shops 11/26.

(ss) Responsibility as the highest ungraded supervisory

position for Shops 11/26; there was not any other civilian position that had authority over Shops 11/26.

(tt) Responsibility for cost control of Shops 11/26 operations.

(uu) Responsibility for executive direction of Shops 11/26.

(vv) Responsibility for final authority in the developing and implementation of programs for Civil Defense—Natural Disaster, Mobilization, etc.

(ww) The rerouting of orders from higher authority direct to the Group Master was in accordance with the official recognition of petitioner's subordinate status, rank and authority. These orders were formerly routed directly to the former Master Shipfitter, when the Master Shipfitter possessed final authority.

(xx) Prior to February 1, 1961, as Master Shipfitter, with final authority over the grouping of shops then known as the Structural Shop 11/26, petitioner performed all duties to the same extent that such duties are now performed by the Group Master.

The foregoing transfer of duties clearly shows that petitioner was reduced in rank.

CONCLUSION

For the reasons shown above, it is respectfully submitted that this petition be granted.

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Appendix A

[Filed December 14, 1964]

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,371 Civil 3293-62

Francis J. Dugan,
Appellant,

v.

Fred Korth,
Secretary of the Navy, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Washington, Burger and McGowan, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel; and it appearing to the court that there is no error affecting substantial rights, it is

ORDERED and ADJUDGED by this court that judgment of the District Court appealed from in this case is hereby affirmed.

Per Curiam.

Dated: December 14, 1964

Appendix B

[Filed December 21, 1965]

September Term, 1965

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam

Senior Circuit Judge Washington did not participate in the foregoing order.